***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

74-2097

To be argued by
DAVID W. McCARTHY

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

-against-

MARVIN LITTLE
JAMES SMALLWOOD,

Appellants

- - - - - - - - - - - - - - - - - - - - - - - -x

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BRIEF FOR APPELLANT MARVIN LITTLE

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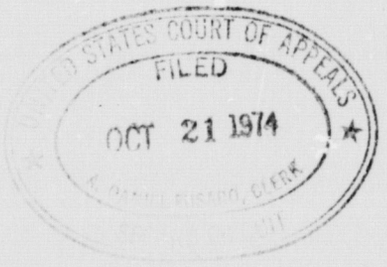
ON APPEAL FROM A JUDGMENT
OF CONVICTION ENTERED IN
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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## QUESTIONS PRESENTED

1. Did the Trial Court commit reversible error in precluding the defense from offering evidence of bias and motive to lie on the part of the informant?

2. Did the Court's intervention in the cross examination of John McCrea and exhibition of annoyance and displeasure with defense counsel deprive him of a fair trial?

3. Did the Court abuse its discretion by admitting into evidence, over objection, the tape recording of the alleged conversation on November 30, 1973 between McCrea and Smallwood?

4. Did the consent by one party to a conversation permitting Governmental electronic surveillance of their conversation validate the surveillance and recording as against claims of an unconstitutional violation of the right to privacy and the Fourth Amendment?

## TABLE OF CASES

## PRELIMINARY STATEMENT

Marvin Little appeals from a judgment, entered May 30, 1974, before District Court Chief Judge Jacob Mishler, with a jury, convicting him of one count of conspiracy to possess and distribute heroin (21 U.S.C. sec. 846, 841(a)(1), 841(b)(A); three dounts of possession with intent to distribute heroin (21 U.S.C. sec. 841(a)(1), 841(b)(1)(A) and Title 18 U.S.C. sec. 2); and two counts of distribution of heroin (21 U.S.C. sec. 841(a)(1), sec. 841(b)(1)(A) and 18 U.S.C. sec. 2)

On August 9, 1974, appellant was sentenced by Chief Judge Mishler to imprisonment for a term of five years on each count and special parole term on each count, to run concurrently.

On August 12, 1974, notice of appeal was duly filed and subsequently, counsel was assigned to represent appellant on this appeal, pursuant to the Criminal Justice Act.

## STATEMENT OF FACTS

The substance of the Government's evidence was provided almost exclusively by John McCrea, a paid undercover informant. This previously convicted felon testified to negotiations with,and purchases of heroin from two persons named "Red" and "Baby Brother". Evidence revealed "Red" was also known as Otis Fauleon. Purportedly corroborative evidence was offered in two forms. Firstly, tape recordings of conversations were introduced, and secondly, testimony

of Drug Enforcement Adminstration (DEA) Agents relating their observations of association between appellants and McCrea. However, at no time could any Agent personally verify an actual transfer of contraband.

## THE AUDIBILITY HEARING

Immediately before trial a hearing was conducted to determine the audibility and admissibility of tapes of telephone conversations among McCrea, "Red" identified by McCrea as appellant Marvin Little and "Baby Brother", identified by McCrea as appellant James Smallwood. The tapes of these conversations constituted Government's exhibits 1 and 2. Additionally, the tape recordings of "kel" set transmissions were played (Government's exhibits 3,4 and 5) Defense counsel objected to the introduction of the"kel" set transmissions particularly, and the telephone tapes as being prejudicial and unprobative. Strenuous objection was raised, more specifically to the recording of November 30( Government Exhibit 5) inasmuch as (1) the entire tape was inaudible as the defense contended and (2) assuming the Government's position that a portion of it was audible, that portion was so minute with respect to the entire tape as to render it untrustworth and unreliable. (see transcript of in camera hearing May 15, 1974). Counsel also objected to all recordings as procured without a warrant and constituting an unconsitutional invasion of privacy. (Hearing p16, 32). Objections by counsel were overruled in a



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decision reproduced in the appendix. (A-8 )

## THE TRIAL

JOHN McCREA, was the first witness for the Government.

Direct Examination:

This witness first worked as an informer in 1971 with the New York City Police Department in Queens County. (35, 235) Prior to that, however, in 1970, he had sold heroin, cocaine, and marijuana. Subsequent to his position with the City police, he was sentenced to jail for one year, upon his plea of guilty to possession of a dangerous weapon. (31)* After he was released from jail and while on parole he decided to seek out the Federal Agents and, on November 11, 1972 agreed to work for them as a paid undercover informant. His change of attitude derived from a realization that selling drugs was wrong, that they adversely effected children, and that he did not want his children using them. (36)

On October 17, 1973, on the corner of Jefferson and Tompkins Avenue, Brooklyn, McCrea conversed with Marvin Little whom he had known for two years only as "Red". (42) They discussed the purchase by McCrea of an ounce of heroin and decided that the witness would contact "Red" to arrange a meeting to consummate the bargain. (42-3) The next day, McCrea went to the DEA headquarters where he was searched for drugs, as on all his visits there. He was given fifteen hundred dollars ($1500.) and a "kel" set was placed on him.** He was then

* The numbers in parentheses refer to the page of the trial minutes.

** A "kel" set is a battery operated transmitting device worn upon the person. The microphone was secreted at McCrea's left chest region. (p. 260)

transported to the corner of Putnam and Tompkins Avenue, the meeting place, which he now testified had been agreed to during the meeting of the 17th. (48-9) He saw "Red" and they both entered a barbershop at that site and walked to the bathroom. There, alone, they discussed the purcahse and McCrea was told to wait a few minutes. (49,263) He walked to the 372 Club, which was nearby, and entered it at 6:40 PM. (50) From the bathroom at the Club, through the "kel" set, he informed Agent Robert Jones that "contact" had been made.

Approximately fifteen minutes later, "Red" and "Baby Brother" entered the bar, and in the presence of other patrons gave the witness two packages containing less than the bargained for amount of heroin. "Red" and "Baby Brother" left together and later, "Baby Brother" returned with the third package, in return for which he received the balance of the purchase price. (59,266) The witness exited the Club and was shortly thereafter pciked up by the Agents to whom he gave the three packages. Despite a functioning "kel" set, no intelligible recording of this event was made. It was undisputed that when McCrea wished tocommunicate with the Agents through the "kel" set, he was understood.(569)

He next met "Red" on November 2 at approximately 11:00 AM, again at the corner of Jefferson and Tompkins.* There they discussed the purchase of 2 ounces of heroin for twenty-six hundred dollars ($2600.00).(64) At 2:00 PM, that

* None of the alleged meetings at Jefferson and Tompkins were ever observed by any Agent.

same afternoon, McCrea went to the DEA headquarters, was given twenty-six hundred dollars ($2600.00) and a "kel" set was placed on him. He called a barbershop and someone paged "Red" who was directed to the telephone. A conversation ensued which was recorded and is reflected in Government's exhibit 1. A second call was also made (exhibtl). McCrea then went to a Bar named Junior's and was followed inside by Agent Jones. (78) After a two and a half to three and ahalf hour wait, they left the Bar. Neither Marvin Little nor James Smallwood was seen. (80, 281)

On November 4th, McCrea called "Red" from Baltimore and said he would be in town on the 5th.* Again, on the 5th, in a recorded conversation (exh 1 and transcript exh 1c), McCrea spoke with "Red" from DEA headquarters. The witness and Agent Jones followed the same procedure as they had on the Second, and again, neither appellant was seen. (82-84)

On November 6, at the corner of Jefferson and Tompkins, the informant agreed with "Red" to meet at another bar, the Phase 3. (85) That afternoon, with "kel" set intact and twenty-six hundred dollars ($2600.00), McCrea was driven by an Agent masquerading as a cab driver to the Phase 3. (88) Meanwhile, surveillance was being conducted of the entrance to bar by other agents, one of whom was operating a videotape camera.

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*Although McCrea testified at length concerning code words e.g. "piece" "ounce" "merchandise", none are heard on any conversation with appellant, although McCrea testified the word "merchandise" was used in this conversation from Baltimore.

In the bar McCrea met "Red" and "Baby Brother" all three of whom entered the bathroom which measured approximately six feet by four feet. (94, 289, 387) McCrea gave the money to "Red" and "Baby Brother" gave him a package. (Government's exhibit 29) They retired to the bar where they conversed for about fifteen minutes, at the conclusion of which the witness asked "Baby Brother" to go outside with him. They were both videotaped. (95)

On November 20, on the corner of Jefferson and Tompkins, the informant discussed the purchase of one-eighth kilo of heroin with "Red" and was quoted a price of forty-seven hundred dollars ($4700.00). (110) The following day, calls were made to "Red" at the barbershop. (Government's exhibit 2, transcript exh. 2b) No exchange occurred either of these two days.

No exchange occurred on November 25. However, an unrecorded conversation took place among McCrea, "Red" and "Baby Brother" in which a sale was arranged for November 28. (133-4)

On November 28, calls were made to "Red" from DEA headquarters (Government's exhibit 2d and 2e). He allegedly understood their conversation to constitute an appointment for that afternoon at the Phase III. There he did not meet "Red", but saw "Baby Brother", who was apparently unaware that any sale was to happen, but who was shown the five thousand dollars ($5000.00) which McCrea

was carrying for the transaction. (142) Baby Brother left the Bar and, after a time, when he did not re-appear, McCrea exited and related to Agent Jones what had transpired. Jones told him to leave word that he would return. (144) After both Jones and McCrea returned to the Phase III, having dined, but saw neither "Red" nor "Baby Brother". (145)

On November 30, McCrea spoke with Baby Brother at the corner of Jefferson and Tompkins. "Baby Brother" told McCrea that he had three ounces. They travelled to Ralph Avenue, where, in an apartment, he was shown heroin. They agreed to meet that night at McCrea's apartment. (167) At 4:00 PM, the witness went to the DEA headquarters where "kel" set was placed on him and he returned to 303 Jefferson Avenue, his residence. (169) A small party was underway, and at about 8:00 PM, James Smallwood arrived and displayed a checkered bag with blue, brown and yellow dots, which contained the subject of their bargain. (173)

Appellant Smallwood joined the party and McCrea, through the "kel" set, informed Agent Jones that he had made contact. (745) Approsimately forty-five minutes later both McCrea and appellant Smallwood left the apartment, drove in the vicinity in McCrea's girlfriend's Mercedes Benz. This conversation was the subject of a recording (Government's exhibit 5) which was played to the jury, over objection. They returned to the apartment, purportedly for McCreato obtain the money. (181) The checkered bag was placed in the

glove compartment and McCrea went upstairs and again through the "kel" set directed the Agents to make arrests of Smallwood and McCrea and that he had the heroin. (204) After five or ten minutes, he returned to the car where he was arrested with Smallwood. (207)

Cross-examination:

A few days before October 17, the witness had arranged with "Red" to discuss the purchase of heroin and they agreed to meet on the 17th. However, no agents ever observed the negotiations which occurred on the corner of Jefferson and Tompkins on the 17th or any other day. (254) On October 17 a meeting was arranged for the 372 Club for the 18th and no subsequent confirmation was required. (256) After the alleged sale on the 18th, McCrea provided a description of the perpetrators and "Red" was described as weighing 200 pounds. (269)

Between October 18 and November 2nd, no conversations were conducted between McCrea and "Red", who by this time, had been identified to him as Otis Fauleon (by the DEA Agents). Their first conversation during that time was (1) the call from the DEA headquarters, (2) a call from "Red" during October 18 and November 2 and (3) a conversation he had with "Red" on the corner of Jefferson and Tompkins on November 2 when negotiations were conducted. (253, 270, 272, 277, 278) However, although discussions regarding the purchase price and amount of a future "sale" were to be discussed, he did not inform Agent Jones of the prospective meeting. (271)

McCrea testified that certain words, e.g. merchandise, piece, thing and ounce were "code" words or euphemisisms for drugs, but, when pressed, acknowledged that none were used in the recorded telephone conversations although the word "merchandise" was used in an unrecorded conversation between "Red" and himself on November 4. (285,286, 296) Although the witness testified that "boy" was another code word and had been used in their recorded conversations, when confronted with the transcripts, he acknowledged that "boy" was not used in any of them as a euphemism for drugs. (300)

The witness' last employment aside from working as an informant was with the Laverty Detective Agency which he left in 1970.(302) The transcript then reveals the following:

> Q. Now, Mr. McCrea, were you employed prior to October 18, 1973, aside from --aside from your employment with the Drug Administration --Drug Enforcement Administration?
>
> A. No.
>
> Q. And when was the last time prior or before October 18, 1973 that you were employed at all, except by the Drug Enforcement Administration and the State Police?
>
> A. In '70 I was working for Laverty Detective Agency.
>
> Q. What was that?
>
> A. I say in '70 I was working for a Laverty Detective Agency.
>
> Q. When did you terminate your employment with that agency?

A. I think I leave in '70. '71 I mean. No, 70

Q. Between 1970 and October 17, 1973 were you receiving welfare payments?

THE COURT: Objection sustained.
MR. McCARTHY: Well, I withdraw the question, Judge.
Q. Between 1970 and October 17, 1973, how were you supporting yourself?

THE COURT: The jury may be excused
(Jury out)
THE COURT I'll take an offer of proof -- (p.302)

* * * * * * * * * *

THE COURT: No, I just want to know what the basis is. May I see it?
MR. McCARTHY: Yes, Judge
May I have this marked, plea, Defendant's Exhibit A. (p. 303)

* * * * * * * * * *

THE COURT: What is this?
MR. McCARTHY: It's an ROR sheet. It's prepared on the arrest of an individual to determine his eligibility for bail or parole.
THE COURT: What do you want to show? (p. 304)
MR McCARTHY: That he was unemployed. He stated that he was unemployed for two years prior to his arrest in this case. (p. 305)

* * * * * * * * * *

THE COURT: You started off by asking this witness whether he was ever on welfare, Improper (p. 314)

* * * * * * * * * *

THE COURT: I might say this: When either one of you defense lawyers put on a witness, and the Government asks whether the witness was ever on relief, I will remind you of this question and this answer.
MR. McCARTHY: Judge --
THE COURT: Don't forget it. (p.322)
MR. McCARTHY: May I be heard, because I think it is important that your Honor understands that I did this not to establish prejudice.
Defendants' Exhibit A says he was unemployed for two years prior to this arrest in September of 1972--
THE COURT: Why do you have to ask him under these circumstances whether he was on welfare? One of those jurors might resent a witness that is on welfare.
MR. McCARTHY: That did not occur to me.
It shows the only way -- the only way he could support himself was through illicit means, that he was not being supported by public assistance.

During 1971, for a few months, which he could not remember, he had sold drugs. However, he had only made about 25 sales, and not much money. (308,368, 456)

On February 7 and March 21, 1972, McCrea pleaded guilty to attempted possession of a dangerous weapon as a felony, arising out of two separate incidents. Thefirst occurred in Queens, the second in Manhattan. For both he received one year incarceration, the first sentence rendered on March 27, 1972, and the second, which was directed to be concurrent with the first, on May 3, 1971. (see Defendants' Exhibit B and H) He acknowledged that when he pleaded guilty he knew they were felonies. (326)

On September 9, 1972, the informant was involved in an incident for which he was eventually indicted. He stated he was taken to the hospital, but not arrested, although he knew he was being charged with an offense when a police guard was posted at his door. In any event, he spoke with an interviewer, the substance of which is reflected in Defendants' exhibit A. The following testimony and colloquy was taken:

Q. Mr. McCrea, when you pleaded guilty did you know what you were pleading guilty to?

MR. SCHALL: Your Honor, I object.
THE COURT: Objection sustained.

Q. Mr. McCrea, isn't it a fact that you pleaded guilty to a felony?

A. Yes

Q. And at the time that you pleaded guilty -- well, withdrawn.

Do you remember the date that you pleaded guilty?

THE COURT: May I see the judgment of conviction?

MR. McCARTHY: Yes, Judge

THE COURT: Objection is sustained to any other questions. Now move to another subject. (p. 311-312)

* * * * * * * * * * * *

MR. McCARTHY: ... I'm trying to lay a foundation for a cross-examination on a point that is in Defendants' exhibit A for identification and it has to do with the date.

THE COURT: Has to do with the date of what? (p.313)

MR. McCARTHY: The date of this conviction.

THE COURT: All right.

MR. McCARTHY: And it has to do with his memory as to the events that occurred on that day. (p. 313-314)

* * * * * * * * * * * *

MR. McCARTHY: Admittedly, Judge.

For instance -- May I just be heard briefly on this particular point -- I just respectfully direct your Honor's attention to the -- to the bottom of the prior convictions on Defendant's exhibit A.

That's what I was getting to. That's a prior inconsistent statement. But I have to lay a foundation for that. I have to establish that the man knew it was a felony when he pleaded guilty.

THE COURT: He says it was a felony.

MR. McCARTHY: But I have to know -- Judge, the question is, Did he intentionallly lie to the person whom he was speaking to? (p. 316)

* * * * * * * * * * * *

MR. McCARTHY: All right, Judge, the reason I asked the next question as to the -- as to whether or not on February the 7th, 1972, he knew he was pleading guilty to a felon is because Defendants' Exhibit A was signed on September the 9th, 1972, subsequent to his plea in that case. It seems to me that inorder to lay a proper foundation, Judge, I have to know whether or not he knew it was a felony.

THE COURT: Let's start at the beginning, What inconsistency did you intend to put before the jury? (p.317)

* * * * * * * * * * * *

MR McCARTHY: Judge, the point is simply this, and this is my offer of proof: On September the 7th -- February 7th 1973, he pleaded Guilty - it's in the Extracts -- to a felony.

On September the 9th, 1972, he was interviewed on an ROR. (p. 318)

* * * * * * * * * * * * *

THE COURT: All right, he pleaded Guilty on February 7th, 1972.

MR. McCARTHY: That ROR Sheet, which is on his yellow sheet, the only reckless endangerment that he had was pursuant to an event that occurred on September 9th, 1972, seven months subsequent to his felony conviction. In that report, he indicates and certifies and signs the report, saying that he had no felony convictions.

* * * * * * * * * * * * *

THE COURT: Wait a while, wait a while.

So that's the big point you want to make?

MR. McCARTHY: That's the point I want to make, but respectfully Judge, I don't ink -- (p. 319)

* * * * * * * * * * * * *

THE COURT: Now, where does it say that he was never convicted of a felon?

MR. KRINSKY: It ways "Prior convictions," Judge, three quarters of the way down.

MR. McCARTHY: Judge, under "Prior convictions."

THE COURT: Oh, I see. Felonies, he put down one -- none, misdemeanors, one. (p. 320)

MR. KRINSKY: The purpose of the sheet is to advise the Court at the time of setting bail.

THE COURT: Examine to your heart's content.

MR. SCHALL: May I make one objection. I feel it is irrelevant. I believe it is predicated on the assumption that Mr. McCrea understands the difference between a felony and a misdemeanor.

THE COURT: In other words, at that time he was only convicted of one offense, and it may very well be that he misunderstood, and he thought he was convicted of a misdemaneor, and it turned out to be a felon.

I will allo w you to explain any apparent inconsistency as to why he did it, and under what circumstances he did it.

Neither side will be prejudiced

MR. McCARTHY: May 1 note one thing?

He did not only have one conviction. He had more. He had conviction for a possession of a wepon on August 4, 1972. He had two convictions at that time.

THE COURT: Bring all that out. (p. 321)

McCrea went on to testify that had told the Assitant United States Attorney that had only two convictions (he had three)

notwithstanding a vivid recollection of the occasions upon which he pleaded guilty. (230, 232)

Although McCrea could not remember when he started working for the Drug Enforcement Admistration it was established that it was November 11, 1972. (333,334) He had contacted them and met at his Parole Office on W. 40th Street. He was not promised money, assistance with parole nor immunity from prosecution for sales that had committed. (43-440) However, he was told he could not be prosecuted for his illegal "pushing" because he had admitted them and they were past. (456)

When he commenced his cooperation, he did not know he had a case pending, despite the fact that, in fact one was pending. (333-4, 423) He was eventually indicted for reckless endangerment in the first degree, a Class D felon, arising out of the September 9, 1972 event. On October 11, 1973, he went to court, having been arrested on an outstanding bench warrant issued with respect to the reckless endangerment indictment. There Agent Jones assisted in procuring his release. (442,3) On November 29, 1973, he pleaded guilty to a Class "B" misdemeanor with a maximum penalty of 90 days in jail as opposed to 7 years, the maximum penalty for the Class "D"felony. (445) Subsequently, a bench warrant was issued when he failed to appear for sentence on December 19, 1973 and January 7, 1974. In May, 1974, before this trial he was brought to Supreme Court, Kings County where his bench

warrant was vacated and he was sentenced to a "conditional discharge". When counsel attempted to elicit the substance of the charge upon which McCrea was convicted, the Court limited inquiry to the fact of conviction only. (360)

Agent Robert P. Jones, an Agent of the Drug Enforcement Administration was present on October 18, 1973 when McCrea was taken to the vicinity of the 372 Club and observed him meet Marvin Little and enter a barbershop. McCrea later exited the shop and walked to the 372 Club. (470-2) Approximately, 15 minutes later Marvin Little entered the 372 Club alone and left later, alone (474, 520)

On November 2d, phone calls were placed from his office, recorded and McCrea was driven to Junior's. The witness followed him into the Bar and remained there for approximately three hours. When neither defendant showed up, they both left. (440-483) On the fifth of November, the same events occurred, again with negative results. (488)

On November 6, the Agent did not enter the Bar, and to his knowledge, Marvin Little was not seen during the approximately one and one-half hours of surveillance by various agents. On November 21 and November 28, calls were made to "Red", but no exchanges occurred. (494-498)

On November 30, he observed McCrea with James Smallwood, driving in the vicinityof McCrea's apartment at

303 Jefferson Avenue and he monitored and recorded the transmission for the kel set worn by McCrea (504-511)

At no time before Marvin Little's arrest in the early morning hours of December 1, was "Red" ever identified to the Agent by McCrea as Marvin Little. (522) And after appellant's arrest the Agent described him as being 5' 6" and 250 pounds. (534)

When the informant commenced his cooperation in November 1972, there was no mention of any case pending. (535) It was first discussed on the 12th or 13th of October 1973 after McCrea had been arrested upon a bench warrant. (536-7) Letters were sent to the judge and District Attorney's office after the witness was advised of the nature of the charge pending against McCrea. (556)

Jeffrey Weber, a forensic chemist established that the exhibits offered by the Government containing a white powder were heroin.

Upon the completion of the Government's case, both defense counsel moved for dismissal which was denied.

The only witness for the defense was Selma Dove, a typist for the Department of Correction who had known McCrea since 1969 and had known people in the community who knew him. She testified his reputation was that he could not be believed. She also testified, over objection, upon cross-examination that she had been convicted of a felony of stealing four dollars from the mails and had been given a Youth Corrections Act sentence of two years probation which

she had successfully completed. (679709)

Appellants' motion for acquittal were denied and and after deliberation, the jury convicted both appellants of all six counts of the indictment.

## ARGUMENT

### POINT I

### THE COURT'S REFUSAL TO PERMIT EVIDENCE OF BIAS AND MOTIVE RESPECTING MCCREA CONSTITUTED REVERSIBLE ERROR

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The curious transformation of John McCrea, gun-toting pusher, to an effective arm of law enforcement was crucial to the prosecution. If one gave credence to McCrea his metamorphasis was accomplished through a concern for saving his children from person's like himself, i.e.pushers, and a comprehension that such conduct was wrong. *

The defense however, offered to show that his motivations for cooperation were purely selfish - the avoidance of the serious legal consequences of discharging a revolver at another person, perhaps a Housing Authority Police officer, and pointing that revolver at the Officer. (pp.338-349)

On September 9, 1972, McCrea was involved in an incident which resulted in his arrest and indictment for reckless endangerment in the first degree. For some time afterwards, McCrea testified, he was in a hospital, confident in his innocence. Furthermore, he testified, he was told

* p. 36 of transcript:
"Q. How did you begin to work as an informant for the Drug Enforcement Administration?
A. Well, I was into it once myself and then I had known a lot of people that was into it, that was dealing and stuff so I though maybe Icould do something about help cleaning up some of the things by dealing -- I realized during this time that it also showed me why it was wrong, also, and I seen what it was doing to different kids and stuff, and I have kids myself and I wouldn't want to see them on it."

he would not be indicted inasmuch as he had testified before the Grand Jury. On November 11, 1972, McCrea apparently motivated as described on direct examination (p. 36), spoke with Agents of the Drug Enforcement Administration at his parole officer's office. He volunteered to act as an undercover informant. On October 11, 1973, McCrea was arrested pursuant to a bench warrant issued with respect to the indictment for reckless endangerment. With Agent Jones present in court, he was released. Subsequently, the DEA sent a letter to Judge Starkey, the Judge who eventually sentenced him. They also directed two letters to the Kings County District Attorney's office requesting a dismissal or reduced plea for McCrea. In fact, their request was honored, and on November 29, 1973, he pleaded guilty to a class "B" misdemeanor. The minutes of the plea (Defendants' Exhibit E) reveal an act of extraordinary viciousness - McCrea acknowledged shooting a gun so as to cause a grave risk of death and pointing a loaded weapon at a Housing Authority Patrolman. Whether the shot fired was directed at the Patrolman is not clear from the minutes. However, the Court precluded examination beyond the mere fact of conviction, limiting inquiry to strictly impeachment questions.

In United States v.Masino, 275 F.2d 129 (1960), this Court, in reversing the defendant's conviction for distributing heroin commented upon the scope of cross-examination to be permitted regarding motive, interest and bias:

> When a witness in a criminal case is being questioned as to his possible motives for testifying falsely, wide latitude should be allowed in cross-examination. Cross examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined. United States v. Lester, 2d Circ. 1957, 248 F.2d 329 334-335 (at p. 132)

Although McCrea testified that he had believed himself innocent of the September 9, 1972 incident, and had witnesses to prove it, his statements to New York State Supreme Court Justice Vetrano are to the contrary. (Defendants' Exhibit E) He acknowledged that he had placed life in jeopardy by firing a shot and had pointed a loaded revolver at a Housing Authority Patroman. This information, counsel would argue is damning to McCrea's coincidental offer of assistance tothe Government. One who committed the vicious acts MCCrea admitted would almost certainly be incarcerated, having two prior felony convictions, particularly when they involved possession of weapons. Had exmination revealed that McCrea had fired the shot at the officer, argument would be even more forceful as to motivation inasmuch as he may have feared an indictment for attempted murder of a police officer, with the mandatory life imprisonment sentence.*

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* The New York State Penal Law sec. 110.05, effective Sept. 1, 1970 classified as a class "A" felony the attempted murder of a peace office in the course of performing his official duties.

Penal Law provides for life imprisonment upon conviction of a Class "A" felony and section 1.20 of the Criminal Procedure Law defines a "Peace Officer" as a "Police Officer" and subsection 34 defines as "Police Officer" as follows:

(d) A sworn officer of an authorized police department or force of a city, town, or village or police district;

(e) A sworn officer of an authorized police department of an authority...;

In any event, it could be argued, his acknowledged conduct on September 9, 1973 caused him to seek every method, foul and fair, to ameliorate his prospective punishment. And when he had established himself with the DEA, to use deceit and fabrication to remain in the Agents' good graces.

Moreover, the chronology of events would substantiate counsel's argument. Two months after the September 9 incident he offered his services to the Government. And within a few days of their assistance in procuring his release in Brooklyn Supreme Court, after his apprehension on the bench warrant, he incriminated the appellants.*

In United States v. Pacelli, 491 F.2d 1108 (2d Circ. 1974) this Court reversed Pacelli's conviction as the Government had neglected to reveal a letter reflecting an accomplice-witness' (Barry Lipsky) intense desire to testify against Pacelli and assist the Government. Notwithstanding an "abundance of impeaching material" the Court viewed the letter as the "capstone" of the defense inasmuch as it revealed a person "frantic" tosave himself from a murder conviction in State Court.

Here, McCrea's successful circumvention of incarceration for his September 9 activities was a forceful motive to fabricate cases. Before the plea and sentence,it would ingratiate him with the Agents, assuring their effective intervention on his behalf, and, in retrospect, it would be an expression of gratitude.

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* Agent Jones assisted in McCrea's release on October 11, 1973 and October 17, is allegedly, the date of the first negotiation with Little. There is no written report relating to negotiations between Little and Smallwood on any dated before October 17.

The testimony that McCrea was permitted to plead guilty to a reduced plea was woefully insufficient to convey to the jury the significance of the Government's intervention. Unfortunately, argument was limited to the jury explaining motive inasmuch as only the fact of the conviction was elicited and the Court viewed this testimony as pure impeachment only. Furthermore, a lay jury could not be expected to comprehend even that difference and gravity of a class "D" felony and class "B" misdemeanor. But defense contentions regarding McCrea's motive to lie would be substantiated by the evidence that McCrea was released without punishment after firing a gun, perhaps at a police officer, and at least pointing the weapon at the Officer. The assurance of the conviction of appellant, it could be argued, is a manifestation of gratitude to the Government, who, in effect, helped him "beat the rap". United States v. Lester, 248 F.2d 329,334 (2d Circ., 1957); United States v.Pacelli, supra. Such testimony and consequent argument is a particularly effective defnse tool, denied appellants here:

> A defendant's major weapon when faced with the inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias or motive to falsify. Evidence of such matter is never collateral(citations omitted), for if believed, it colors every bit of testimony given by the witness whose motives are bared. United States v. Blackwood, 456 F.2d 526 (2d Circ. 1972) (emphasis added)

In United States v. Haggett, 438 F.2d 396 (1971),

in reversing the defendant's conviction, this Court stated:

> Of course, there is no litmus test method to determine whether extrinsic evidence should be admitted to prove that a witness had a motive to testify falsely as to a particular matter, but a defendant should be afforded the opportunity to present facts which, if believed, could lead to the conclusion that a witness who has testified against himeither favored the prosecution or was hostil to the defendant. United States v. Lester supra, atp. 334. Evidence of all facts facts and circumstances which 'tend to show that a witness may shad his testimony for the purpose of helping to establish one side of a cause only,' should be received. (citation omitted)
>
> (at p. 399)

Adducing this evidence certainly would not have cause unreasonabl confusion or delay, particularly when the Court, as here, manifests a tight reign on examination. Moreover, this evidence would have enabled counsel to answer the Assistant United States Attorney's argument in summation that McCrea's motives were basically sefless. United States v. Wolfson, 437 F.2d 862 (2d Circ. 1970)

The proffered testimony and exhibit would not have been mere surplusage, inasmuch as motive had, by no means, been established. Both Agent Jones and McCrea had stated that no promises had been made whatsoever. And the testimony of relatively minor financial compensation was repeatedly downplayed by McCrea and the Government. In effect, the Government's position was that McCrea had no motive to lie. cf. United States v. Blackwood, supra, at p. 530 Indeed the prosecutor here, quoted,in summation McCrea's own testimony* self-serving as it was, and represented

* Transcript of trial p. 832

that testimony as McCrea's motive.

The curtailment of this crucial subject matter was exacerbated by the Court's juxtaposition of McCrea's prior history of convictions with Selma Dove' one transgression for stealing four dollars from the mails. * In effect, McCrea's convictions were equarted with Dove's effectively minimizing any substantial impeachment value they may have possessed. Consequently, this evidence of motive, interest and bias, would have been signficantly substantiated the defense.

Furthermore, the devious machinations of McCrea and his opportunistic perversion of the Government's attempt to assist him would hav e become clear. McCrea had told the Assistant United States Attorney an exculpating explanation of the September 9 incident, in distinct contradiction to his statements at the time of plea. McCrea, it would be argued, had attempted to elicit sympathy for his plight from the Assistant as he had manipulated the Government to assist in obtaining a reduced plea.

In any event, none of these arguments could be made at trial, as the Court improperly curtailed cross-examination, denying the defense a unique and substantial body of evidence establishing McCrea's motive, interest and bias.

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* See p. 883 of minutes, reflecting the Judge's charge.

## POINT II

### THE TRIAL COURT'S INTERVENTION IN THE CROSS EXAMINATION OF THE GOVERNMENT INFORMANT, AND SIMULTANEOUS EXPRESSIONS OF DISPLEASURE WITH COUNSEL DEPRIVED THE DEFENDANT A FAIR TRIAL

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During the course of the cross-examination of the informant, the Court interrupted defense counsel's question on numberous occasions, frequently without prior Government objection. The manner of the judge's rulings displayed displeasure and annoyance with counsel's interrogation, communicating an impression that the defense inquiries were intentionally improper and irrelevant, thereby denigrating the appellant's defense.

From the commencement of the trial, counsel had informed the Court that the defense, basically, was the incredibility of the informant McCrea. The cornerstone of this defense could be laid only by vigorous cross-examination demonstrating internal contradictions and prior inconsistent statements. Additionally, however, counsel intended to prove that McCrea was manipulative and opportunistic, illustrated by incriminating appellant to avoid prosecution for an extensive and lengthy involvement in the illicit drug business, encompassing at least one and one half years.

Although it is axiomatic that in the Federal System a judge need not remain a mere observing automoton during trail, he should avoid communication, in any form, of his judgement regarding the validity of a defense. As this Court admonished in United States v. Brandt, 196 F.2d 653, (2d Circ. 1952):

> Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence.

This is not to say the court intentionally embarked upon an improper course of conduct to deny appellant a fair trial. However, the press of court business*and coupled with an assumption of impropriety and unreasonableness of questions and requests, the Court believed minimally relevant, culminated in irritation and displeasure with counsels' cross-examination. This Court observed in United States v. Nazzaro, 472 F.2d 302 (2d Circ., 1973) at p. 304.

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*1 In response to counsels' request for information regarding promises made to McCrea at the inception of his cooperation with the Drug Enforcement Administration (Trial Court minutes pp.115-121), the Court stated:

> THE COURT: I have been working about 10 hours a day, and I am getting a little tired, at the present time two trials at once, and every once in in a while when it gets about give past 1 and I get these demands that on their face are unreasonable--incidentially, you might turn something up to prove me wrong, the one case out of a million. We have to got through it and I will just do it. I want the record to say I don't like it. p. 122.

> We must be mindful of the fact that trials in the district courts are not conducted under the cool and calm conditions of a quiet sanctuary or an ivory tower, and that enormous pressures are placed upon district judges by an ever increasing criminal docket and a demand, expressed in part by Rule of the Second Circuit Judicial Council for speedier trials of criminal defendants. These pressures can cause even conscientious members of the bench, such as the trial judge in this case in their anxiety to keep pace with the flood of litigation, to give vent to their frustration by displaying anger and partisanship, when ordinarily they are able to suppress these characteristics.

Counsels' request for any documents indicating consideration or promises given for cooperation drew a characterization of said request as unreasonable.*2 Apparently, the Court construed defense requests as mere attempts to create a record for appeal. *3

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*2 In fact, after perusing Government's exhibit 31 (McCrea's file), during the luncheon recess, immediately following the colloquy reproduced in footnote 1, the Court directed that exhibit 31a, a letter to State Supreme Court Justice Starkey be given to counsel

*3 The following comment related to the same request as is contained in footnotes 1 and 2:

> THE COURT: Counsel never asked for these things because they think there is anything in it, they hope for denials of the request so there is something on the record to show their cross-examniation was severely limited.
>
> You do your job as defendats' counsel, but I must also say for the record that I recognize the request. It is not made in bad faith, but, on the other hand, it is one of these blanket requests to so-called 'protect the record'. (p. 125

When counsel attempted to show that McCrea was unemployed for two years before his arrest in September, 1972 and had no visible means of support, to lay a foundation for arguing he was engaged in illegal activity during that time, the Court was deprecating. *4 (see Defendants' exhibit A) And questions intended to establish a profligate life-style of McCrea, unsuitable to an idle individual, but consistent with being a pusher, examination was abruptly terminated. *5 Even a request for the record of payments to McCrea was greeted with a sarcastic remark. *6

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*4 THE COURT: It's amazing. You sure have to scratch pretty deep to prove an inconsistent statement. (p. 306)

*5 THE COURT: All right, cntinue, Mr. McCarthy.
MR. McCARTHY: Thank you, Judge.
Q. Mr. McCrea, between your employment at Laverty Detective Agency in 1970 and October 17, 1973, how were you supporting yourself?
THE COURT: Sustained as to form.
Q. Were you supporting yourself?
THECOURT: Did you have a job? Were you working?
THE WITNESS: No,your Honor.
THE COURT You were?
THE WITNESS: No
THE COURT: You were not.
Go ahead, Mr. McCarthy.
Q. And where were you living between 1970 and 1973?
THE COURT: Objection sustained.
Mr. SCHALL: You honor, this is misleading.
THE COURT: Strike out Mr. Schall's statement.
Objection sustained. It's irrelevant. Nex question, Mr. McCarthy. (p. 306-307)

*6 MR. KRINSKY: I would like to have a record of payments which have been made to the informant in this case.
THE COURT: Give him the record of payments. If he is underpaid, we will ask the Government to make it up. (p. 119)

The Court's denigration of attempts toestablish the defense were exacerbated by an apparent misapprehension of the purpose for counsel's inquiry. When counsel began to lay a foundation for argument that McCrea had been "dealing drugs" for both 1970 and 1971, the Court understood the questions merely to relate to impeachment when it was also addressed to motive. *7 When counsel asked whether the witness was receiving public assistance, the judge concluded the purpose was to prejudice the jury, rather than exclude alternative sources of income during 1970 and 1971. *8 The Court sustained it's own objection to counsel's questions intended to lay a foundation to impeach McCrea as to a prior inconsistent statement. Defendant's exhibit A

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*7 THE COURT: Then you pointed out to me that what you wanted to prove, that this witness was a liar when he said that he didn't work for the two year period, and in fact he did work. If you wanted to put that in, even though I thought it was questionable, it was a prior inconsistent statement, or, at least, you are allowed to inquire on it. When I gave you the paper back, you didn't ask any questions about that.

MR. McCARTHY: Judge, that was not my purpose, My purpose was to show that the man was dealing in drugs at that time, and that's how he was uspporting himself, not to show that he was -- (p.314)

*8 See Statement of Facts p.9.

In fact, Defendants' Exhibit A will reveal that the witness should have answered the question in the negative as to whether he was on welfare at the time of his arrest.

indicated that he had informed the interviewer that he had no prior felony convictions, when in fact he had two. However, when counsel tried to show that McCrea comprehended the grativy and classificationof his pleas to attempted possession of weapons as a felony, his inquiry was stopped by the Court's own objection.*9 The above -related circumstances combined to cause annoyance by the Court toward counsel culminating in the abrupt termination of cross-examination (see footnote 8), which the Court later permitted to continue (see footnote 9) and which elicited a reaction from at least one of the jurors. *10

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*9 See Statement of Facts p. .

*10 THE COURT: Objection is sustained to any other questions. Now move to another subject.
MR. McCARTHY: May I then ask, Judge, that that be distributed to the jury?
THE COURT: Of course. That's proper. (p.312)
MR. McCARTHY: And then I would just --
THE COURT: Give it to the Foreman.
MR. McCARTHY: Judge, may we have a side bar?
(jury out)
THE COURT: Do you want this witness to leave the courtroom?
MR. McCARTHY: He can stay.
Judge, at this time, I respectfully move for a mistrial.
THE COURT: Motion denied.
Now, seat the Jury.
MR. McCARTHY: Judge, Iwould like to be heard on this--
THE COURT: GO ahead.
MR McCARTHY: (continuing) --most respectfully. (p.313)
* * * * * * * * * * * *
MR. McCARTHY: Judge, may I just be heard?
THE COURT: Yes, put everything on the record that you want.
MR. McCARTHY: I'm just saying that your tone of voice --I heard one of the jurors make some reaction to the way you Honor was --
THE COURT: What did the juror say?

(cont'd over)

The Court itself noted that the tone was intended to curtail a subject of cross-examination, which, after colloquy the Court permitted. Meanwhile, before the jury, he had characterized the subject matter as "irrelevant". However, the Court's initial misapprehension of the purpose of the question, and consequent telegraphing of that interpretation to the jury, eliciting an extraordinary discernible reaction from a juror, necessarily remained with the jury inasmuch as no curative instruction was given. United States v. Boatner, 478 F.2d 737, 741 (2d Circ. 1973) Indeed, upon the return of the jury, they were not informed of the Court's reversal of the ruling and concomitant comment.

It is indisputable that jurors perceive trial judges as experienced arbiters of the truth with extraordinary acumen and judgment. Jurors therefore, search for guidance from the only person in the courtroom they know is not an adversary, and perceive a judge's reactions and manner toward counsel as indicia of the merits of the subjects of cross-examination. In this case that cross-examination constituted the defense. Consequently, "trial judges must display patience with counsel so as not to prejudice

*10 continued

MR. McCARTHY: It was like --It was a guttural reaction, like "Oh", or some non-verbal reaction, Judge. I wasn't directly listening to that, but the reaction is such that I know that the juror is inferring from your Honor's yelling at me that I am intentionally asking improper questions, and I'mnot.

THE COURT: I think youwere. There were a number of questions that were improper. I didn't say that before the jury.

Mr.McCARTHY: I didn't intentionally do it, Judge.

THE COURT: But when I spoke to you in that tone it was intended to signal to you to get off that type of examination.

MR. McCARTHY: Admittedly Judge (pp315-316)

a party or create an impression of partisanship before the jury. " United States v. Pelligrino, 470 F. 2d 1202 at p. 1207 (2d Circ. 1972). Even warranted critical comments following mild admonitions should be made outside the presence of the jury. United States v. Coke, 339 F.2d 183 (2d Circ. 1964)

When the Court sustained its own objection to counsel's interrogation regarding the informant's employment during 1970 and 1971 and his prior inconsistent statements with the comment that it was irrelevant, the appellant's defense was criticized. The simultaneous exhibition of displeasure and annoyance, preceded as it was by other abrupt sustaining of objections, man of them, sua sponte, indicated the areas of cross-examination were improper. Therefore, the jury could infer, they were unworthy of co nsideration. When counterbalanced with the Court's non-intervention in the Assistant United States Attorney's direct and cross-examination, the Court conveyed the impression that the defense was meritless. United States v. Coke, supra, at p. 185. The Court's repeated solicitude for McCrea exacerbated the effect of his expression of annoyance for defense counsel. *11

*11 On eight separate occasions the Court informed McCrea that in addition to a yes or no answer he could state that he was unable to answer or did not remember the answer. (see pp243,245,252, 253, 273, 276, 355 and 377) It is not here argued that apprisal, by a Court, of the alternative answers is, per se, improper. However, here, the Court's repeated admonition served to validate the witness' selective memor as honest forgetfullness. The defense contention obviously, was that McCrea's failureof memory, in distinction to his flawless recollection direct, was to circumvent effective cross-examination.

The Court even implied some independent knowledge of

Furthermore, the Court's reference to counsel's inquiry as "summation", (p.292 ) only served further to belittle counsel's examination. United States v. Guglielmini, 384 F.2d 602, 605 (2d Circ. 1967)

This Court's observation in United States v. Ah Kee Eng, 241 F.2d 157 (19 ) is particularly appropriate: (at p. 161)

> While the trial judge should be permitted considerable latitude in dealing with counsel ruling on objections and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of thedefense.

Any contention that the Court's response was warranted by counsels' tactics or disregard of rulings is invalid. At no time did either defense counsel fair to honor the Court's rulings, and, in fact, extended full cooperation to the Court. Offers of proof were made when requested, and, occasionally, spontaneously, for the purpose of avoiding any unncesary objections andto establish authorized parameters of examination. cf. United States v. Boatner, supra. at p. 740.

Finally, the evidence against appellant was far from

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*11 continued. McCrea's bad memory:

THE COURT : You are asking a question in the negative. Didn't he make a call to you between October 18th and November 2d, that's the question, if you can reaall?

Remember getting any aall from the defendant whom you call Red?

THE WITNESS: I don't remember, your Honor

THE COURT: That's the answer. (p.276 )

overwhelming. McCrea's testimony was the foundation without which the Goverment's case must fall in a heap of insfuficiency. The appearance of solicitude toward him, copled with displeasure with counsel implying unfair questioning could only create sympathy for McCrea and bolster his credibility. Athe Agents offered for corroboration provided only tangential assistance, and in some instances contradicted McCrea's testimony. Although Agent Jones observed the 372 Club on October 18, he testified, contrary to McCrea's version, that he saw Little enter the 372 Club alone and leave alone. Moreover, on November 6, no agent observed Little in the vicinity of Junior's and, on each occasion that Agent Jones accompanied McCrea to the locationof thealleged prospective transfer, neighter appellant nor Smallwood was observed. Significantly, no agent ever saw the exchange of anything among Little, Smallwood and McCrea, notwithstanding an alleged notorious exchange in the 372 Club on October 18 in full view of the patrons thereof.

McCrea himself was evasive and contradictory on cross-examination. Althoug he exhibited an impeccable memory on direct, including correcting the Assistant United States Attorney on a minor mistake of date, (p.101) on cross-examination his faculties of recollection diminished considerably. He also contradicted himself regarding the substance of the October 17 meeting, at one time stating that all elements of the proposed sale had been finalized onthe 17th, and at another time that they were to meet on the 18th to complete

arrangements. He stated on direct that appellant and he had met on the infamous corner of Jefferson and Tompkins on November 2, but on cross he stated this negotiation, a sine qua non, of the November 6 sale, did not occur.

The Court's expression of irritation and displeasure with counsel, wihtout curative instruction, in the context of this case, established a judicial posture of hostility toward the defense. The cumulative effect of the appearance of partisanship denied theappellant a fair trial.

## POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE THE TAPE RECORDING OF THE NOVEMBER 30, 1973 CONVERSATION BETWEEN MCCREA AND SMALLWOOD.

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The use of recording devices in aid of criminal investigations has become common place. Their value issues from their capacity to preserve for subsequent listening, pertinent conversations and often, incriminating ones. And, in a proper case, the conversation recorded will be a substantial assist to the jury in separating the evidentiary wheat from chaff. Unfortunately, the admission of the tape recording of the November 30 meeting between

McCrea and Smallwood served only to mislead the jury and bolster the Government's case based upon an unprobative and unreliable recording. Appellant Little was prejudiced as the Court instructed the jury that if they found a conspiracy had been proven the conversation was admissible against Little.

It is undisputed that the question of the admissibility of the tape recordings is within the discretion of the trial court. In fact, inaudibility of parts of a tape, in and of itself, is not fatal to its introduction. United States v. Weiser, 428 F.2d 932, 937 (2d Circ. 1969) However, a tape may be so untrustworth, due to its substantial inaudibility and unintelligibility as to constitute error if admitted into evidence. Monroe v. United States, 234 F.2d 49, 55 (D.C. Circ. 1956), cert denied 352 U.S. 873 (1956). United States v. Bryant, 480 F. 2d 785 (2d Circ. 1973).

The defense contended at the pre-trial hearing that the tape was so substantially inaudible with respect to the amount of time elapsed during the recording itself, and vis a vis the duration McCrea was wearing the device, at least four hours, as to be inadmissible. The recording revealed not a chain of recorded conversation "weak" in places, but, unlike the tape in Bryant, supra, completely broken discussions. The Government could not reasonably contend that any substantial part of any conversation was intelligible. Only individual words, at best phrases, are allegedly heard,

totally out of context.

It's introduction is more grave because it must have carried great weight with the jury. As noted in Monroe v United States, supra at p. 55, the recording can substantiate the Government witness' testimony. Indeed, its offer here was for no other purpose, inasmuch as it was not disputed that Smallwood was present with McCrea that evening. Here, the admission of the tape was not probative of the conversation inasmuch as practically all the conversation was unintelligible and no continuity of verbal exchanges could be perceived. However, it's reception was prejudicial in that it was being offered and accepted as representative of the conversation in issue. Having been told what McCrea's version of that conversation was, and the tape being offered by the Government, the jury could hypothesize that it did in fact corroborate McCrea.

This error was particularly egregious where, as here, the defense contended that McCrea was fabricating and, in fact, was uncorroborated as to the substance of the indictment, by any of the Government Agents, videotapes and tape recordings. The tape, consequently, constituted illusory corroboration but undoubtedly impressed the jury in the absence of an offer of any other kel transmissions, notwithstanding the clear evidence that McCrea wa s fitted with a "kel"set on October 18 and November 6. Having offered no other recording, the jury could deduce, this recording

must, in fact, corroborate McCrea by its mere offer and acceptance.

Consequently, reception into evidence,and the playing to the jury of the recording constituted an abuse ofdiscretion.

## POINT IV

### THE ADMISSION INTO EVIDENCE OF THE TAPE RECORDINGS, WHICH WERE THE PRODUCT OF WARRANTLESS GOVERNMENTAL ELECTRONIC SURVEILLANCE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

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At the audibility hearing, counsel for Smallwood objected to the introduction of the recordings as an unconstitutional invasion of privacy. Appellant joined in the objection.

Although this Circuit has ruled in United States v Kaufer, 406 F. 2d 550 (1969) that consent of one party to a conversation to Governmental electronic surveillance of said conversation validates the surveillance, appellant preserves his objection. United States v. White 401 U.S. 745,1971 (19 ) did not settle the question and there appears to be a split among the circuits with the Seventh Circuit deciding that the warrantless surveillance is unconstitutional. United States v. White 405 F.2d 838 (1970) rev'd on other grounds by United States v. White, supra.

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

**McCARTHY & DORFMAN**

*Attorneys for*

*Office and Post Office Address*

**SUITE 310**
**1527 Franklin Avenue**
**MINEOLA, N. Y. 11501**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

**McCARTHY & DORFMAN**

*Attorneys for*

*Office and Post Office Address*

**SUITE 310**
**1527 Franklin Avenue**
**MINEOLA, N. Y. 11501**

To

Attorney(s) for

Ind
Index No. 74-2097 Year 19

UNITED STATES COURT OF APPE
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against

MARVIN LITTLE,
JAMES SMALLWOOD

AFFIRMATION OF SERVICE

**McCARTHY & DORFMAN**

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**(516) 746-1616**

To

Attorney(s) for

Service of a copy of the within

is hereby admitt

Dated,

.....

Attorney(s) for

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ed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellee

AFFIRMATION

-against-

74-2097

MARVIN LITTLE
JAMES SMALLWOOD

- - - - - - - - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)

NASSAU COUNTY )

DAVID W. MCCARTHY, affirms under the pealties of perjury that affirmant is not a party to the action, is over 18 years of age, and resides at 265-24 74th Avenue, Floral Park, New York.

That on the 21st Day of October, 1974, affirmant served the within brief for Little and Smallwood upon David Trager, Esq. United States Attorney for Eastern District of New York, at 225 Cadman Plaza East, Brooklyn, N.Y., the address designated by said attorney for that purpose by depositinga true copy of same enclosed in a postpaid prpperly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

DATED: October 15, 1974
NASSAU, NEW YORK

David W. McCarthy

## CONCLUSION

FOR THE ABOVE-STATED REASONS APPELLANT'S JUDGMENT OF CONVICTION SHOULD BE REVERSED, AND A NEW TRIAL ORDERED.

Respectfully submitted,

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